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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1235

REUBEN STURMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 15, 1968.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The petitioner Reuben Sturman respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered herein on February 17, 1968.

OPINIONS BELOW

The unreported order of the United States Court of Appeals for the Sixth Circuit, dismissing the appeal for lack of finality of the order appealed from, is reprinted in Appendix A hereto, p. 1a, *infra*.

The oral opinion of the United States District Court for the Northern District of Ohio, Eastern Division, together with that court's order respecting the grand jury subpoenae, are reprinted in Appendix B hereto, p. 2a, *infra*.

JURISDICTION

The Sixth Circuit's order dismissing the appeal from the District Court's order respecting the grand jury subpoenas was entered on February 17, 1968. This petition for certiorari was filed within 30 days from the entry of the Sixth Circuit's order. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under 28 U.S.C. § 1291 to hear and determine an appeal from a federal district court order refusing to quash certain grand jury subpoenas where it was claimed (a) that enforcement of the subpoenas would interfere with individual rights under the First, Fourth and Fifth Amendments to the United States Constitution, and (b) that those rights would be irretreivably lost and could not later be vindicated following the enforcement of the subpoenas.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, § 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ..."

STATEMENT OF THE CASE

This case arose in the course of a federal grand jury investigation in Cleveland, Ohio, of possible violations of federal obscenity statutes. It involves some 2000 books, magazines, pamphlets and other publications, as well as countless corporate records, books and other data.

On June 9, 1967, grand jury subpoenas were served upon the Royal News Company, World Wide News

Company, Cuyahoga News Company, Imperial News Company and Paperback Stores, Inc. Service on all these corporations was effected by serving the petitioner Reuben Sturman, an officer in each of these companies. The subpoenas required the production of all corporate records before a federal grand jury sitting in the Northern District of Ohio, Eastern Division. Each of the companies (hereinafter sometimes referred to as the distributors) is engaged in the business of distributing a large variety of hard cover and paperback books and magazines, either locally or throughout the country.[1]

The subpoenas were identical and demanded that each company produce virtually all its records pertaining to the sale, acquisition, consignment or distribution of "paperback or hard cover books or magazines or any other form of printed or pictorial matter or combination thereof." (1a-3a.) They were not restricted to any given book but called for all the distributors' records.

When petitioner objected to what he termed the dragnet nature of these subpoenas, the Government attached to the subpoenas practically all of the distributors' catalogues for the last several years, together with a prepaid list of books totalling more than 2000 titles. (Govt. Exs. 1-13.) The Government then advised the District Court that the records demanded were limited to that list. (R. p. 3, 4.)[2]

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[1] World Wide News Company also publishes paperback books.

[2] "R" refers to the original transcript of proceedings in the District Court on July 13, 1967. The references in this Statement of the Case to such pages as "2a" and "7a" are to the printed appendix attached to petitioner's brief in the Sixth Circuit; all of the items in that appendix are in the certified record on file with this Court.

ANALYSIS OF SUBPOENAS

Annexed to each of the subpoenas was an itemized list of the records demanded. This, in turn, was related to the Government's list of over 2,000 books made up of the distributors' catalogs and the prepared Government list. (Gov't. Exs. 1-13.)

In abbreviated form, the items demanded by the subpoenas included:[3]

(1) All corporate correspondence * * * concerning the sale, acquisition, consignment or distribution of paperback or hardcover books or magazines or any other form of printed or pictorial matter or combination thereof.

(2) All corporate correspondence with any author, artist, etc. about manuscripts or books.

* * * * *

(5) All distribution records of the corporation which reflect the name of the consignee or addressee mailed or shipped to, and the identification of the item shipped and the carriers.

(6) All receiving records of the corporation which reflect the name of the sender or consignor, together with the identity and quantity of items received and the names of the carriers.

(8, 11, 12 & 13) All cancelled checks, payment vouchers, bank accounts, vouchers, check registers and payroll entries.

(14) All contracts with any printer, publisher, distributor, author, literary agent, or editorial or other literary advisor, entered into by the distributor.

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[3] The numbers of the categories listed here correspond with the numbered item on each subpoena's list. (2a-3a.)

In essence, no record pertaining in any fashion to the listed books was exempt from these subpoenas.

BOOKS UNDER INVESTIGATION

An analysis of the Government's list of books and the distributors' catalogs disclosed approximately 2,016 titles which form the subject of the Grand Jury's investigation. The titles can be divided into the following categories:

Paperback Pocket Books	936
Nudist Books	267
Girlie Magazines	308
Hard Cover Books	117
Male Physique Books	33
Miscellaneous	273
Total	2,016 (6a)

Henry Miller's Books

Among the hardcover and paperback books listed are Henry Miller's *Tropic of Cancer; Tropic of Capricorn; Black Spring; Sexus, Plexus; The Airconditioned Nightmare;* and *World of Sex.*

Best Sellers

Also listed are widely circulated well known novels by established authors such as

Candy;
Last Exit to Brooklyn;
Naked Lunch;
Fanny Hill;
The Marquis DeSade;
The Thief's Journal;
My Life and Love;

The Invisible Glass;
Rebel Without a Cause;
The Olympia Reader;
Games People Play;
No Place to Hide;
Shoot the Piano Player;
Trial of Doctor Adams;
Cuba: Tragedy in Our Hemisphere;
Red Star Over China;
The Village Voice Reader;
The Adventurers;
Ecce Homo;
The Story of O.

Other familiar books listed include:

The Hindu Art of Love;
The Perfumed Gardens;
Kama Sutra;
The Love Pagoda;
The Secret of Creation;
My Sister and I;
City of Night;
The Motorcycle;
Malcolm X Speaks;
MacBird;
The Erotic Minorities;
Destination Nowhere;
The Image;
A Strange Love;
The Rape of India;
Guadalupe;
A Man From Orgy;
The Addict in the Street;
The Godless Christians;
Barbarella.

Medical and Non-Fiction Books

Medical books and scientific studies in the area of sex included on the list are:

The Sexually Responsive Woman;
The Modern Book of Marriage;
Sex Crimes in History;
Sadism in the Movies;
Practical Birth Control;
Abnormal Sex Behavior;
History of Eroticism;
Sex in the Classroom;
Premarital Intercourse and Relationship;
The Erotic Revolution;
Homosexuality, Its Cause and Cure;
An ABC of Love;
Sex and Its Mysteries;
The Power of Love;
The Cradle of Erotica;
Unconventional Sex Behavior;
The Southern Rape Complex;
The Bisexuals;
Female Masturbation;
Aphrodisiacs and Love Stimulants;
The Lolita Complex;
The Juvenile Homosexual Experience;
Case Book of Female Behavior;
Lesbianism and the Single Girl;
The Promiscuous Wife;
Auto Eroticism in the Female;
Confessions of a Male Prostitute;
Male Sexual Deviations and Practices;
Male and Female Sexual Deviations;
The Male Homosexual;
The Homosexual in America;

Psychopathia Sexualis;
Art of Love;
Sexual Behavior;
American Dictionary of Sexual Terms;
Female Sexuality;
Frigidity in Woman;
Sadism and Masochism;
Sexual Anomalies;
Aberrations of Sexual Life;
Summer in Sodom;
Sex Offenders in Group Therapy;
Perversions Psychodynamics Therapy;
Forbidden Sexual Behavior and Morality;
Bride and Groom;
Handbook for Husbands.

Humorous Books

Even books devoted to humor were unable to escape the Government's blanket investigation, to-wit:

Fanny Hillman;
Goodnight Lyndon;
Sadness is a Back View;
Please Don't Eat the Crabgrass;
My Son the Candidate;
Max Does This Mean We're Engaged;
Sam, the Ceiling Needs Painting;
Unhappiness is a Dirty Dog;
Happiness is a Rat Fink;
Sex and the Single Cat;
My Son the Daughter;
Some of My Best Jokes Are Jewish;
From Sex to Sexty;
Diary of a Jewish Madam.

The books enumerated above are, of course, supplemented by a large number of other books and magazines which admittedly deal very frankly with the subject of sex.

COURT PROCEEDINGS

The petitioner applied to the Federal District Court to quash the subpoenas and to suppress the evidence demanded, on the grounds that the subpoenas were oppressive and unreasonable and that they violated the petitioner's rights under the First, Fourth and Fifth Amendments of the United States Constitution.

These issues were presented to the Hon. William K. Thomas in the United States District Court for the Northern District of Ohio, Eastern Division on July 13th, 1967. A brief was furnished to the Court by the petitioner which demonstrated that material similar to that which was the subject of the investigation had been declared to be constitutionally protected in a number of decisions rendered by the United States Supreme Court on or before June 12th, 1967.[4]

Counsel urged before Judge Thomas that because the listed books were presumably constitutionally protected

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[4] The decisions relied upon by the petitioner were:

As to paperback books—*Redrup* v. *New York*, 386 U.S. 767; *Keney v. New York*, 388 U.S. 440; *Aday* v. *United States*, 388 U.S. 447; *Books, Inc.* v. *United States*, 388 U.S. 449; *A Quantity of Books* v. *Kansas*, 388 U.S. 452; *Corinth Publications, Inc.* v. *Wesberry*, 388 U.S. 448; *Friedman* v. *New York*, 388 U.S. 441.

As to nudist magazines—*Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372; *Rosenbloom* v. *Virginia*, 388 U.S. 450.

As to girlie magazines—*Austin* v. *Kentucky*, 386 U.S. 767; *Gent* v. *Arkansas*, 386 U.S. 767; *Avansino* v. *New York*, 388 U.S. 446.

As to male model books—*Mounce* v. *United States*, 355 U.S. 180; *Manual Enterprises* v. *Day*, 370 U.S. 478.

the distributors should not be required to produce all these records unless the Government showed some basis for claiming obscenity. It was proposed that the rule should be that once an investigation of First Amendment material is challenged, it becomes incumbent upon the Government to demonstrate to an impartial judicial officer the existence of probable cause to believe that the investigated books are not entitled to constitutional protection.

Nevertheless, no facts (or other information) were ever furnished to the Court in any way demonstrating a basis for a claim that the material is obscene.

It was also urged that, under the guise of corporate subpoenas, petitioner's Fifth Amendment privilege against self-incrimination was being violated.

PRIOR RESTRAINT

Information was supplied to the District Court by affidavit that the records demanded were essential to the daily operation of the businesses of the subject companies. (6a-8a.)

Each of the distributors, with the exception of Paperback Stores, Inc., is concerned with the distribution of books or magazines to various customers throughout the country. (6a.) All merchandise is sent to customers on a consignment basis. (6a.) When an order is received from a customer, the distributor is required to check his distribution records to determine the customer's credit balance. (6a.) If the credit balance is satisfactory, the order is shipped; if not, the order is not shipped until credit requirements are satisfied. The daily use of the subpoenaed records

is also necessary to determine discount policies which vary among the customers. (7a.)

The correspondence demanded is integrated with the distribution records and for the most part reflects discount rates and terms of payment. (7a.) Therefore without the distribution records and the correspondence, it is virtually impossible to continue the distribution of books and magazines. (7a, 8a.)

The receiving records of the distributors, also demanded under the subpoenas, constitute the companies' inventory control records. (7a.) The original receiving records, which are preserved and are used as a daily account of what orders have been received, are then matched daily against the orders which are shipped in order to determine the inventory balance (7a.) As receiving records, they are essential to the distributor's daily operation due to the constant flow of orders and the constantly changing need to replenish the merchandise. (7a.) Without them, the distributor's operations cannot be continued because it would be impossible to determine the orders to be refilled. (7a, 8a.)

DECISION OF DISTRICT COURT

On July 20th, 1967, the Hon. William K. Thomas announced his decision. He required the production of *all* of the distribution and receiving records together with most of the other items demanded in the subpoenas.

He relieved the distributors from producing the records relating to the unit costs of books; the records of accounts receivable and accounts payable; the records of capital assets and the company's payroll records with the exception of the names of all employees. Of

the fourteen items enumerated in the subpoenas the production of eleven was required.

Judge Thomas rejected the petitioner's constitutional arguments and held:

(1) Nothing in the Fourth Amendment or in the decision in *Hale* v. *Henkel,* 201 U.S. 43, indicates that a grand jury must show probable cause to justify production of the materials sought in a subpoena duces tecum. See Appendix B, p. 3a, *infra.*

(2) While relevancy of the material sought to the general subject of the grand jury investigation may be raised in a proceeding to suppress or modify a subpoena duces tecum, some exploration or fishing is necessarily inherent and entitled to exist in grand jury documentary demands. See Appendix B, pp. 3a-5a, *infra.*

(3) Here the declared scope of the grand jury proceedings was to inquire into (a) possible violations of federal laws dealing with the mailing and interstate transportation of obscene materials, (b) possible conspiracies to distribute such material, and (c) the related problems of possible pandering in the production, sale and publicizing of the questioned materials (*Ginzburg* v. *United States,* 383 U.S. 463; *Mishkin* v. *New York,* 383 U.S. 502). See Appendix B, p. 5a, *infra.*

(4) While a subpoena may be unreasonable if its enforcement would put a stop to a company's business and while serious attention must be given to any resulting prior restraint that offends First Amendment guarantees, "it is concluded that the present record does not warrant or permit the complete quashing of the subpenae." See Appendix B, p. 8a, *infra.*

DISMISSAL OF THE APPEAL

Petitioner duly and promptly noted an appeal from the District Court's order and thereafter filed in the Sixth Circuit a full brief on the merits of the appeal.

The United States, however, filed in the Sixth Circuit a motion to dismiss the appeal for want of jurisdiction. Following consideration of opposing briefs on this jurisdictional problem, the Sixth Circuit on February 17, 1968, ordered the dismissal of the appeal "for the reason that the order of the District Court is not a final decision," citing 28 U.S.C. § 1291 and *Cobbledick* v. *United States,* 309 U.S. 323. Appendix A hereto, p. 1a, *infra.*

REASONS FOR GRANTING THE WRIT

The judgment below embodies a highly significant and dubious jurisdictional ruling, a ruling that is contradicted by the principles of finality heretofore established by this Court and more particularly by the decision in *Perlman* v. *United States,* 247 U.S. 7. The grant of certiorari thus becomes appropriate in the interests of proper administration of justice in the federal appellate courts.

The Sixth Circuit has ruled that it lacks jurisdiction under 28 U.S.C. § 1291 to consider an appeal from a refusal to quash federal grand jury subpoenas, even though the constitutional objections to the subpoenas can be asserted and vindicated only at this juncture. And the Sixth Circuit has sought sanction for that ruling by citing *Cobbledick* v. *United States,* 309 U.S. 323.

Cobbledick does indeed reflect the general proposition that ordinarily an appeal does not lie from the denial of a preindictment motion to quash a subpoena duces tecum commanding the production of documents

before a federal grand jury. The *raison d'etre* for that proposition is that the prompt and effective vindication of the criminal law depends upon "forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy." 309 U.S. at 325. In other words, if the objections to the subpoena can later be renewed and vindicated either at the trial or on appeal from a conviction, an appellate interruption of the "single controversy" is unjustified at this juncture.

But as this Court recognized in *Carroll* v. *United States,* 354 U.S. 394, 403:

> ". . . certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U.S.C. § 1291 . . . Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made *prior to indictment,* or in a *different district* from that in which the trial will occur, or *after dismissal* of the case, or perhaps where the emphasis is on the *return of property* rather than its suppression as evidence." [Emphasis in original.]

One of the prime illustrations of the type of appealable orders thus referred to in *Carroll,* and one that was expressly discussed and approved in *Cobbledick,* 309 U.S. at 328-329, is to be found in *Perlman* v. *United States,* 247 U.S. 7. There certain impounded documents owned by Perlman were, on the Government's motion, directed to be produced before a grand jury. Perlman petitioned the district court to prohibit such production, invoking his privileges under the Fourth

and Fifth Amendments. An appeal to this Court was allowed from the denial of Perlman's motion, thereby overruling the Government's contention that the order of denial lacked appealable finality. As explained in *Cobbledick,* 309 U.S. at 328-329:

> "To have held otherwise would have rendered Perlman 'powerless to avert the mischief of the order. . . .' 247 U.S. at 13. Perlman's exhibits were already in the court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes."

The District Court order in the instant case would appear to possess at least the same degree of finality as the order involved in *Perlman.* In both cases the order declined to proscribe the production of documents before a grand jury.[5] And in both cases the

[5] No meaningful distinction can be drawn between the procedural natures of the orders in the two cases. In *Perlman,* the order denied a motion to prohibit the production of documents before the grand jury. In the instant case, the order refused to quash or effectively limit subpoenas commanding the production of documents before the grand jury. The form of the *Perlman* motion was dictated by the fact that the documents had already been impounded and were in the court's possession. In the instant case, of course, there had been no such impounding and the only type of relief open to the petitioner was a motion to quash or limit the subpoenas. Such an effort by petitioner is just as much a separate proceeding, for purposes of the finality doctrine, as *Perlman's* motion.

claim was made that such production would violate the Fifth Amendment's privilege against self-incrimination. But the additional claims in the instant case lent an even greater air of finality to the order denying the motion to quash the subpoenas. Here the petitioner also claimed that the forced production of so many of the corporate records before the grand jury would make it impossible for the companies to continue business, thus rendering the subpoenas an unreasonable and oppressive form of search and seizure under the Fourth Amendment. Moreover, the petitioner here also claimed that the production of the printed materials, at least without a prior showing before a judicial officer as to probable cause to believe that the publications are obscene, would interfere with the freedom of the press and would constitute a prior restraint upon publication, all in violation of the First Amendment.

Thus the critically significant feature of both cases is that the asserted constitutional rights sprang from and related exclusively to the imminent grand jury inquiry into the documents. Those rights had nothing to do with possible use of the documents in later criminal proceedings. And those rights with respect to the grand jury inquiry could not later be asserted or vindicated at the criminal trial or the appeal therefrom. Unless those rights are asserted now, the petitioner—like Perlman—would be left "powerless to avert the mischief of the order." 247 U.S. at 13. In that crucial circumstance, the instant order under the *Perlman* rationale must be considered to have sufficient finality and to be sufficiently separate from the overall criminal proceeding as to be appealable under 28 U.S.C. § 1291.

The decision below must accordingly be viewed as in direct conflict with the *Perlman* ruling of this Court and with the finality doctrines (of which the *Perlman* ruling is an integral part) recognized by this Court in *Cobbledick* and *Carroll*.

While the merits of petitioner's constitutional claims have not been assessed by the Sixth Circuit and hence are not in issue before this Court, it is relevant to note the substantiality of those claims, particularly the assertion that the First Amendment's proscription of prior restraints was violated by the commands respecting the production of thousands of books and records. Even the District Court here recognized that "surely serious attention must be given to any resulting prior restraint, concomitant but none the less real, which would offend the first amendment guarantee of free expression of ideas" in the context of these grand jury proceedings. See Appendix B hereto, p. 8a, *infra*.

This Court has often said that "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. . . . We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70. Surely, then, it is a significant question whether, as petitioner has urged, this constitutional need for "an almost immediate judicial determination of the validity of the restraint" applies to restraints imposed by grand jury subpoenas. And of even more immediate relevance is the fact that the raising of that issue at the point of enforcement of the subpoenas should add to the finality and review-

ability of an order declining to impose such a judicial determination. Unless that order is reviewed at this juncture, the unconstitutional restraint may come into existence and basic First Amendment rights may be lost irretrievably and without later recourse.

CONCLUSION

For these various reasons, the writ of certiorari should issue and the decision below should be fully reviewed by this Court.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18,008

ERCHES STURMAS, *Petitioner-Appellant*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*

Order

Before: EDWARDS, CELEBREZZE, and McCREE, Circuit Judges.

APPENDIX

Appellee has moved to dismiss this appeal from an order of the District Court refusing to quash a grand jury subpoena ordering appellant to produce certain records. Upon consideration, it is ORDERED that said appeal be, and hereby is, dismissed for the reason that the order of the District Court is not a final decision. 28 U.S.C. § 1291; *Cobbledick v. U.S.*, 309 U.S. 323 (1940).

Entered by order of the Court

Clem. W. Barnes
Clerk

Filed: Feb. 17, 1968.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18,098

REUBEN STURMAN, *Petitioner-Appellant*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*

Order

Before EDWARDS, CELEBREZZE, and MCCREE, Circuit Judges.

Appellee has moved to dismiss this appeal from an order of the District Court refusing to quash a grand jury subpoena ordering appellant to produce certain records. Upon consideration, it is ORDERED that said appeal be, and hereby is, dismissed for the reason that the order of the District Court is not a final decision. 28 U.S.C. § 1291; *Cobbledick* v. *U.S.*, 309 U.S. 323 (1940).

Entered by order of the Court

CARL W. REUSS
Clerk

Filed: Feb. 17, 1968.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

In the Matter of REUBEN STURMAN

Oral Opinion Rendered by Hon. William K. Thomas, Judge of Said Court, on Thursday, July 20, 1967

THOMAS, J.: After several hearings on the application of Reuben Sturman for alternative orders regarding grand jury subpoenae, I am prepared to render my ruling.

Under the federal constitution and laws of the United States, the grand jury has "a broad power of investigation and inquisition," *Blair* v. *United States,* 250 U. S. 273. Its vast power of inquiry "is not to be narrowly limited by questions of propriety or forecast of probable results." *Blair, supra.*

A grand jury's power of investigation to determine probability of criminal violation is essential in a free society. It is obliged to ferret out and to pursue possible crime and at the same time through its secret proceedings to protect from unnecessary public scorn and unfair humiliation those citizens who may be investigated but who are really innocent of any crime.

A grand jury while not independent of the court is not subject to the court's directions and orders with respect to the exercise of its essential functions. *United States* v. *United States District Court,* 238 F. 2d 713. A grand jury may issue subpenas on its own decision or in conjunction with the United States Attorney. Its semiautonomous status permits it to set its own course of investigation. It is not dependent upon a court for prior approval before issuing a subpena.

Hale v. *Henkel,* 201 U. S. 43 (1906) held, among other things, that "an order for the production of books and

papers may constitute an unreasonable search and seizure within the Fourth Amendment." The opinion later stated that "a general subpena of this description is equally indefensible as a search warrant would be if couched in similar terms." A test of reasonableness must be applied. Nevertheless *Hale* did not hold, nor will its language be implied to hold that a grand jury or the United States Attorney must show probable cause to justify the materials sought in a subpena duces tecum. The fourth amendment requirements for a magistrate's issuance of a search and seizure warrant do not apply, I have concluded, to the issuance of grand jury subpenas. Not required to establish probable cause in the first instance, a grand jury cannot be compelled to supply evidence of probable cause should compliance with a subpena duces tecum be resisted by a witness. To impose such a requirement would hobble the venerable and essential investigatory powers of a grand jury. The recent decision of the United States Supreme Court cited by the applicant (Marcus, Quantity of Books, Freedman, and Bantam Books, Inc. to identify them by name) do not deal with grand jury action and are inapplicable thereto, it is concluded.

Nevertheless, a grand jury's power of subpena is not all powerful. It is not law unto itself. If excessive the exercise of the grand jury power of subpena may be curbed by a court. When compliance will be unreasonable or oppressive a subpena may be quashed or modified pursuant to a motion under Rule 17(c), Federal Rules of Criminal Procedure. The adoption of Rule 17(c) codifies and implements the power to suppress or modify a subpena originally recognized to rest on the fourth amendment, *Hale* v. *Henkel, supra.*

In re. Grand Jury Subpena Duces Tecum, 1961, 203 F. Supp. 575 (S. D. N. Y.) and cases cited therein hold that the fourth amendment's prohibition against unreasonable searches generally applies to grand jury subpenas.

The subpena must be reasonable and "reasonableness, in this context, has three components." (1) "The subpoena duces tecum may command only the production of things relevant to the investigation being pursued," (2) "The subpoena must specify the things to be produced with reasonable particularity," and (3) "The subpoena may order the production of records, covering only a reasonable period of time."

In a proceeding to suppress or modify a subpena duces tecum, the question of relevance of the material sought to the general subject of the grand jury investigation may be raised. However, as held in *Schwimmer* v. *United States,* 232 F. 2d 855, at 862 (1956):

> Relevance and materiality necessarily are terms of broader content in their use as to a grand jury investigation than in their use as to the evidence of a trial. They must be given practical meaning in relation to the functions which a grand jury is designed to serve and to the realities which are necessary in any expeditious carrying-on of its operations. Thus, a grand jury has no catalog of what books and papers exist and are involved in a situation with which it is attempting to deal, nor will it ordinarily have any basis for knowing what their character or contents immediately are. It can therefore hardly be expected to be able to designate or call for what its exact needs may ultimately turn out to be.

The opinion continues with this guideline:

> And since the path which it is entitled to travel in its search for probable cause has no general limits except those of reasonableness on the entirety of the situation being pursued, it obviously has a right, as against the objection of unreasonable search and seizure, to a fair margin of reach and material in seeking

> information, not merely direct but also as a matter of possible light on seemingly related aspects whose significance it is seeking to uncover. Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury.

In light of these governing principles, consideration of the application for alternative orders re: Grand Jury subpenas turns to the relevance of the materials sought by the subpenas to a possible area of grand jury inquiry. In his brief opposing the application to quash, the United States Attorney has generally revealed the scope of the contemplated grand jury inquest. His brief states:

> The purpose of the present inquiry is the investigation of the mailing and interstate transportation of obscene materials in violation of Sections 1461 and 1462 of Title 18, United States Code. In addition to investigating the distribution of obscene materials, the Grand Jury may properly investigate the existence of a conspiracy to distribute such materials.

He further states:

> The determination of the obscenity of materials is not limited to an examination of the materials themselves. It is equally relevant to that determination that those publishing and distributing questioned materials are engaged in conduct which constitutes the "sordid business of pandering." Ginzburg v. United States (1966) 383 U. S. 463; Mishkin v. United States (1966) 383 U. S. 502. The circumstances surrounding the production, sale and publicizing of questioned materials are as important to the Grand Jury in determining the obscenity of materials as is an understanding of the constitutional tests set forth in Roth v. United States (1957) 354 U. S. 476.

This indication of the likely course of the inquiry though it does not foreclose the Grand Jury pursuing other lines of inquiry, is presently helpful in ruling on Sturman's application to quash or modify the grand jury subpenas which have been issued. *Ginzburg* and *Mishkin* references accordingly will provide criteria in making a determination of the present application. Significantly, the *Redrup* per curiam of May 8, 1967 stated that in none of the cases under consideration "was there evidence of the sort of 'pandering' which the court found significant in *Ginzburg*."

So then I cite the criteria from these two cases that I think become important here:

(1) *Ginzburg* at 465:

> In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which publications were presented as an aid to determining the question of obscenity, • • •
>
> As in *Mishkin* v. *New York* • • • we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.

(2) *Ginzburg*, at 467:

> Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—"the business of purveying textual or graphic matter openly

advertised to appeal to the erotic interest of their customers." (Roth v. United States, supra, 354 U. S., at 495-496 (Warren, C. J., concurring).)

(3) *Ginzburg*, at 468:

The "leer of the sensualist" also permeates the advertising for the three publications. The circulars sent for EROS and Liaison stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters.

(4) *Ginzburg*, at 474:

We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test.

(5) *Ginzburg*, at 474:

No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.

Mishkin, at 508:

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals

to the prurient interest in sex of the members of that group.

It is contended—and an affidavit is tendered to the effect—that the subpenas presently before the Court involve the production of virtually "all papers" pertaining to approximately 2,700 individual books and magazines between June, 1964 and June, 1967, a three-year period. It is said that the production of the ledgers, account receivables, and other records in this category, would prevent further distribution of books and magazines. It is urged that compliance with the subpena would constitute prior restraint. It is noted that *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963) declares "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity."

In *Hale* v. *Henkel, supra,* the order of production was found to be unreasonable because, if enforced, it would completely put a stop to the business of that company. In addition to the possible unreasonableness of any order to produce materials, generally proscribed under the fourth amendment, surely serious attention must be given to any resulting prior restraint, concomitant but none the less real, which would offend the first amendment guarantee of free expression of ideas. However, it is concluded that the present record does not warrant or permit the complete quashing of the subpenae. With certain exceptions hereafter to be noted the subject matter of the subpenae is determined to be reasonably relevant to the contemplated inquiry, reasonably limited in time, and sufficiently particularized in description of the materials sought.

I proceed then to the order:

Subpena Categories 1, 2, 4, 8, 11, 12, and 14 may provide information and facts relevant under one or more

of the Ginzburg and Mishkin criteria, or verification of such information.

Subpena Categories 5 and 6 may provide the names of possible witnesses or possible participants in joint activities conceivably involving a conspiracy to violate a federal law.

Subpena Categories 7 and 13 may provide relevant names for possible witnesses. However, 13 will be limited to names of previous or present employees. Any other payroll record information need not be disclosed.

Categories 3, 9, and 10 are denied. None of these, on the present record, is deemed relevant or likely to lead to relevant information.

As to the order of modification to be entered, it is further ordered:

(1) With reference to all materials ordered to be disclosed it may be produced separately for each of the years involved. The year beginning June 1, 1964 shall first be produced. At subsequent reasonable intervals thereafter the materials for the year beginning June 1, 1965 and June 1, 1966 may be produced.

(2) Any witness who has been subpenaed may comply with the subpena by designating a proper custodian of the said records and materials within its possession and/or control, which custodian shall produce and deliver such records or other materials to the office of the United States Attorney for the Northern District of Ohio, for inspection and examination by the Grand Jury. However, by agreement of the parties, it shall not be necessary to convene a session of the Grand Jury to obtain said delivery and inspection by the office of the United States Attorney.

(3) No witness so appearing if before the U. S. District Attorney will be subject to interrogation other than for the purpose of identifying the records produced.

(4) Any original corporate books and records, if detained by the Government for any period longer than two weeks, shall be duplicated, and a true copy thereof made by the Government, and returned to the witness.

Order Re: Grand Jury Subpoenae

(Filed July 28, 1967.)

This matter came on before the court on July 13 and 20, 1967 upon the Application of Reuben Sturman for Alternative Orders Re Grand Jury Subpoenae, certain exhibits, statements, arguments and briefs of counsel, and after due consideration, the court rendered an oral opinion including rulings and orders.

It Is Therefore Ordered That,

(1) The subpoenae shall apply to Royal News Company, Paperback Stores, Inc., World Wide News Company, Cuyahoga News Company, Imperial News Company; but shall not apply to Discount Book Store, Inc., Majestic News Company, Spot Discount Stores, Inc., and Crown News Company.

(2) The corporations found subject to the subpoenae shall produce the documents specified in subpoenae categories 1, 2, 4, 5, 6, 7, 8, 11, 12 and 14. As to subpoena category 13, said corporations are required to disclose the names of previous or present employees contained in said payroll records, but otherwise the information contained therein need not be disclosed.

(3) Requests for documents in subpoena categories 3, 9, and 10 are denied.

(4) With reference to all materials ordered to be disclosed it may be produced separately for each of the years involved. The year beginning June 1, 1964 shall be first produced. At subsequent reasonable intervals thereafter

the materials for the year beginning June 1, 1965 and June 1, 1966 may be produced.

(5) Any witness who has been subpoenaed may comply with the subpoena by designating a proper custodian of the said records and materials within its possession and/or control, which custodian shall produce and deliver such records or other materials to the office of the United States Attorney for the Northern District of Ohio, for inspection and examination by the Grand Jury. However, by agreement of the parties, it shall not be necessary to convene a session of the Grand Jury to obtain said delivery and inspection by the office of the United States Attorney.

(6) No witness so appearing if before the U. S. District Attorney will be subject to interrogation other than for the purpose of identifying the records produced.

(7) Any original corporate books and records, if detained by the Government for any period longer than two weeks, shall be duplicated, and a true copy thereof made by the Government, and returned to the witness.

/s/ WILLIAM K. THOMAS
United States District Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

REUBEN STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM SUGGESTING MOOTNESS

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

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REUBEN STURMAN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM SUGGESTING MOOTNESS

This case arose out of a federal grand jury investigation in Cleveland, Ohio, into possible violations of federal obscenity laws. On June 9, 1967, the grand jury issued subpoenas duces tecum directed to petitioner, as an officer of five book and magazine distributing companies, for the production of various records of the companies which might tend to show pandering in the sale and preparation of publications. Petitioner moved in the United States District Court for the Northern District of Ohio to quash the subpoenas con-

tending that they were overly broad and amounted to a prior restraint on the corporations' right of free expression. The district judge narrowed the subpoenas to some extent (see Pet. 9a-11a) and sustained them as modified. Petitioner's appeal to the United States Court of Appeals for the Sixth Circuit was dismissed on the authority of *Cobbledick* v. *United States*, 309 U.S. 323, the court holding that the district court's denial of the motion to quash the grand jury subpoenas was not a final decision under 28 U.S.C. 1291.

The term of the grand jury which issued the subpoenas expired on March 29, 1968. Since the efficacy of the subpoenas ceased with the termination of the grand jury, the present controversy is moot.[1]

Therefore, the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

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[1] We are advised that the United States Attorney's office in Cleveland intends to seek new subpoenas duces tecum, directed to the five distributing companies involved here, from a new grand jury to be empaneled on April 18, 1967, but that the scope of the subpoenas, in terms of the number and kind of books to which they relate, will be considerably more limited than those which were at issue here.

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